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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 465

SKINNER MANUFACTURING COMPANY,
A NEBRASKA CORPORATION,

Petitioner,

vs.

KELLOGG SALES COMPANY, A MICHIGAN CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN OPPOSITION.

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REPORTS OF OPINIONS IN THE COURTS BELOW.

The opinion of the District Court will be found at 52 F. Supp., 432-52, and that of the Circuit Court of Appeals at 143 F. (2d) 895-900, Adv. Shts. We shall refer to these opinions as they appear in the printed record.

STATEMENT OF CASE.

The opinion of the Circuit Court contains a brief general statement of the facts (R. Vol. VII, 4-6), which, although

not complete, will enable this Court to appreciate the nature of the case. A complete statement of the facts will be found in the 64 findings of fact made by the District Court (R. 142-70). In his opinion, the District Court also states the facts, but more briefly than in his findings (R. 106-11; 119-123; 125-126; 130-132; 136-139).

We do not regard it as necessary to make a separate statement of facts, but in our argument, under the points to which they relate, we shall refer to several findings of fact made by the District Court and the evidence supporting them.

ARGUMENT.

I. THE SHREDDED WHEAT CASE (KELLOGG CO. v. NATIONAL BISCUIT CO., 305 U. S. 111) DECIDES PRACTICALLY ALL IMPORTANT LEGAL QUESTIONS IN THIS CASE ADVERSELY TO PETITIONER. THE FACTUAL ISSUES HAVE BEEN DECIDED ADVERSELY TO IT BY THE TWO LOWER COURTS.

(a) The Shredded Wheat case decides the question in this case with respect to the exclusive right to use the name Raisin Bran.

In the *Shredded Wheat* case, plaintiff claimed the exclusive right to use the term "Shredded Wheat", which was registered as a trademark under the Act of 1920. This Court decided that registration under that Act had no effect on the domestic common-law rights of the parties (footnote 3, 305 U.S. 117); the term was generic; since the term was generic the original maker of the product acquired no exclusive right to use it; and as Kellogg had the right to make the article, it also had the right to use the term by which the public knew it (305 U.S. 116-7).

Here petitioner claims the exclusive right to use the term Raisin Bran, also registered under the same 1920 Act. Its cereal product is composed of flakes made of whole wheat and added bran mixed with whole raisins and a little salt (Finding 4, R. 143). The total bran content of the flakes in petitioner's product, including the bran normally present in whole wheat and that added thereto, is between 27% and 36% of the total cereal content (Finding 37, R. 162).

The trial court (R. 125-129) and the Circuit Court (R. Vol. VII, 7) held the term raisin bran to be descriptive of ingredients of the product. Following the *Shredded Wheat* case, it was, therefore, held that the original user of the term acquired no exclusive right to use it and any producer who had the right to make the article had the right to use the name by which the public knew the article (R. 127, R. Vol. VII, 8).

Apparently petitioner does not now dispute the correctness of the decisions of the lower courts upon this question. It states at page 45 of its brief that it "is not claiming the term 'Raisin Bran' as a technical trademark, but predicates its rights upon the establishment of a secondary meaning."

(b) The Shredded Wheat case determines the legal questions in this case with respect to the establishment of secondary meaning for the name.

In the *Shredded Wheat* case, plaintiff contended that the name Shredded Wheat had acquired a "secondary meaning". This contention was based upon evidence that during a long period plaintiff was the only manufacturer of the product; many people had come to associate the product, and as a consequence the name by which it was known, with plaintiff's factory; and \$17,000,000 had been expended by plaintiff "in making the name a household

word and identifying the product with its manufacture." Notwithstanding, this Court held that Kellogg was "free to make shredded wheat when it chose to do so; and to call the product by its generic name"; that there was no basis for applying the doctrine of secondary meaning; and that "to establish a trade name in the term 'shredded wheat' the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer." (305 U. S. 118.) It was held that the evidence was insufficient to entitle plaintiff to the exclusive use of the term Shredded Wheat "but merely entitles it to require that the defendant use reasonable care to inform the public of the source of its product." (305 U. S. 119.)

Petitioner relies on its exclusive use for 17 years of the term Raisin-BRAN to designate its product, its substantial expenditures in advertising the product by that name, and evidence that some people have come to associate the product and its name with petitioner. But the evidence does not establish that the primary significance of the term in the minds of the consuming public is the producer, not the product. 162 witnesses testified that to them the term Raisin Bran meant a product composed of raisins and bran, or raisins and bran flakes, or a bran cereal with raisins, or a bran cereal with fruit, or a cereal with fruit, or the like. (See subdivision A of Appendix, p. 19 of this brief.) The trial court found:

"At the time of the commencement of this action and at the time of the inception of competition with the plaintiff's product, in 1942 and for several years prior thereto the term raisin bran to ultimate consumers and to the public generally signified a dry prepared breakfast cereal, including as the principal among its ingredients raisins and a bran type cereal, and did not signify or identify either the producer or the distributor thereof." (Finding 14, R. 146.)

The trial court, after referring to the *Shredded Wheat* case and substantially reiterating the above finding, in its opinion said:

“In other words, despite its monopoly of the field during seventeen years and its manifest purpose to individualize the name of its product, the plaintiff has not established for the name any significance other than descriptive.” (R. 131-132.)

The Circuit Court in its opinion referred to the conflicting evidence of the parties upon this question, held that the issue was one of fact and concluded:

“It seems to us, as it did to the trial court, that the name ‘Raisin-BRAN’ was not shown to have acquired such a secondary significance as would justify denying to the appellees the right to use the words ‘Raisin Bran’ in describing their products.” (R. Vol. VII, 9.)

(c) The Shredded Wheat case determines the legal questions in this case with respect to the issue of unfair competition in the marketing of the competing product.

In the *Shredded Wheat* case, plaintiff claimed that Kellogg unfairly competed in the marketing of the product. This Court held the contrary, determining that fairness requires only that the competitor market its product “in a manner which reasonably distinguishes its product from that of plaintiff.” (305 U. S. 120.) This Court referred to the evidence in that case showing that the competing products were sold mainly in cartons, that the Kellogg cartons were distinctive, not resembling plaintiff’s in size, form, or color, and that the Kellogg cartons bore “the names ‘Kellogg’s Whole Wheat Biscuit’ or ‘Kellogg’s Shredded Whole Wheat Biscuit’ so sized and spaced as to strike the eye as being a Kellogg product” (305 U. S. 120-21); mentioned the similarity of the illustrations of the product in a bowl of milk on the cartons of the

competing products; and held "But the name Kellogg was so prominent on all of the defendant's cartons as to minimize the possibility of confusion". * * * "The obligation resting upon Kellogg Company is not to insure that every purchaser will know it to be the maker but to use every reasonable means to prevent confusion." (305 U. S. 120-121.)

Here, as in the *Shredded Wheat* case, the evidence shows that each of the parties sold its product in cartons (R. 143, 156). The respective cartons used are Exhibits 203 (R. 1293) and 295 (R. 1289). The originals have been certified to this Court. These cartons are materially different in coloring and in the printing thereon. The Kellogg labeling and cartons are practically identical with its carton before this Court in the *Shredded Wheat* case (see Exhibit 617-W, R. 931, 1014, the original of which, we understand, has been certified to this Court), concerning which this Court said that the name "Kellogg" was so prominent as to "minimize the possibility of confusion." The color scheme of the carton used by Kellogg in marketing its product involved in both cases is one which has been continuously used since 1907 in marketing most of its products; which has been extensively advertised and illustrated by it; with which wholesalers, retailers, consumers, and the public long have been familiar; and which they readily recognize as a carton containing a Kellogg cereal product. (Finding 54, R. 167-8.) Over 6 billion cartons of this type have been sold by Kellogg. These were approximately 87% of the total number of cartons of cereals sold by Kellogg since 1906. (R. 908.)

The trial court found that any normal member of the public, exercising ordinary care in making a purchase, would easily distinguish the carton used by Kellogg in packaging its product from the carton used by petitioner, and that the general appearance, printing and colors of

the cartons used by petitioner and those used by Kellogg in packaging their products are different; that with the exception of a few inattentive, careless consumers, in immaterial numbers, the evidence does not show that there has been, in fact, any customer confusion arising out of the marketing of the Kellogg product, and the rare instances of confusion have been attributable to negligence of the buyers or to careless merchandising practices by local grocers (Findings 59, 60, R. 169). The trial court concluded that there had been no unfair competition; that Kellogg's product had not been passed off as petitioner's (Finding 62, R. 170). The District Court's opinion thoroughly discusses this matter (R. 135-9). Its findings are supported by the evidence summarized in subdivisions B and C, Appendix, pp. 19-22 of this brief.

The Circuit Court came to the same conclusion, saying: "It would seem that any purchaser of raisin bran who was at all interested in its origin should have no difficulty in identifying the raisin bran marketed by either of the appellees and in distinguishing it from the product of the appellant." (R. Vol. VII, 11.)

* * * * *

There is no conflict between the decision of the Circuit Court in this case and those of other Circuit Courts determined since the *Shredded Wheat* case. In *Little Tavern Shops v. Davis*, 116 F. (2d) 903, 906 (C. C. A. 4) and *Grocers Baking Co. v. Sigler*, 132 F. (2d) 498, 500 (C. C. A. 6), relied upon by petitioner, decided in 1941 and 1942 respectively, it was held that the evidence established the existence of secondary meaning as a matter of fact. Here both of the lower courts determined the evidence to be insufficient for that purpose.

* * *

The foregoing resume shows that the fundamental legal questions in this case have been decided adversely to

petitioner by the *Shredded Wheat* case,¹ and that the factual issues as to (a) whether secondary meaning has been established for the term Raisin Bran, and (b) whether respondent has taken reasonable means to prevent confusion and has reasonably distinguished its product from that of petitioner, have been decided adversely to petitioner, upon full consideration of the evidence, by both lower courts.

* * *

- (d) With respect to establishing secondary meaning, no distinction exists between a case where the name is a descriptive or generic one and a case where the name is one which had been applied to a patent-expired product during the patent period.

There is no distinction in principle between these two types of cases. Under the patent-expired authorities, upon expiration of the patent monopoly, the name applied to the article during the monopoly period falls into the public domain. (*Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169, 185.)

But generic or descriptive names always are in the public domain. (*Warner & Co. v. Lilly & Co.*, 265 U. S. 526, 528.)²

¹ These same legal questions were similarly ruled upon in cases involving the Canadian and English marketing of Shredded Wheat in *Canadian Shredded Wheat Co., Ltd. v. Kellogg Co. of Canada, Ltd., et al.*, 55 R. P. C. 125, and *The Shredded Wheat Co., Ltd. v. Kellogg Co. of Great Britain, Ltd.*, 57 R. P. C. 137.

² To the same effect are the cases of *Elgin Nat'l Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 673; *Del. & H. Canal Co. v. Clark*, 13 Wall. 311, 323, 324; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 603; *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U.S. 446, 453; *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 116-7.

Both classes of names are public property,—generic or descriptive names at all times because there can be no monopoly in such names—, and names of patent-expired products from the expiration dates of the patents, in order to give the public the full enjoyment of what, during the patent period, was a monopoly. The applicable rule is stated in *Trinidad Asphalt Mfg. Co. v. Standard Paint Co.*, 163 F. 977, 982 (C.C.A. 8, 1908), affirmed in 220 U. S. 446, in the following language:

“The important thing is the fact that they are public property, not how they became so. If they are, it follows from that quality alone that all may truthfully apply them to their products, and that no one can lawfully monopolize them.”

Several other authorities are to the same effect.³ No conflicting decisions of Circuit Courts of Appeals upon this question are pointed out in the petition.

(e) There is no conflict between the Shredded Wheat case and Coca Cola Co. v. Koke Co., 254 U. S. 143.

The mark involved in the *Coca-Cola* case was “Coca-Cola.” It was one which was registrable and was registered under the ten-year clause of the 1905 Act. Raisin-BRAN was not properly registrable and was not registered under that Act. Relief was accorded to the Coca-Cola Co. upon the basis of infringement of the trademark so registered. A valid registration under the ten-year clause of

³ *Saxlehner v. Wagner*, 216 U. S. 375, 380-1; *Cellular Clothing Co., Ltd. v. Maxton & Murray*, L. R. (1899) A. C. 326, 344; *Canadian Shredded Wheat Co., Ltd. v. Kellogg Co. of Canada, Ltd.*, 55 R. P. C. 125, 148 (1938); *Pope Automatic Merchandising Co. v. M'Crum-Howell Co.* (C. C. A. 7, 1911, cert. den. 223 U. S. 730), 191 F. 979, 981; *Brooten v. Oregon Kelp Ore Products Co.* (C. C. A. 9, 1928), 24 F. (2d) 496, 497-8.

the 1905 Act creates a statutory presumption of the existence of secondary meaning. (*Thaddeus Davids Co. v. Davids*, 233 U. S. 461, 470.) There is no such presumption in the case of a registration under the 1920 Act. (*Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315, 333, 334.) The facts in the *Shredded Wheat* and *Coca-Cola* cases were entirely different. In the *Coca-Cola* case it was said (254 U. S. 146): "In other words Coca-Cola probably means to most persons the plaintiff's familiar product to be had everywhere *rather than a compound of particular substances.*" But in the *Shredded Wheat* case, as in this case, the evidence showed that the name in question meant to the public a compound of particular substances.

In this case the trial court, upon the evidence of 162 witnesses (subdivision A, Appendix, p. 19 of this brief), found that Raisin Bran "signified a dry prepared breakfast cereal, including as the principal among its ingredients raisins and a bran type cereal, and did not signify or identify either the producer or the distributor thereof" (Finding 14, R. 146). This finding received the approval of the Circuit Court (R. Vol. VII, 8-9).

* * *

Petitioner in Point (2) of its reasons relied upon for allowance of the writ asks the Court to determine whether the term Raisin-BRAN may acquire a secondary meaning, and in Point (3) asks for a determination whether a secondary meaning may be acquired for a trade name applied to an unpatented product during a period when there was no competition in the market. (Pet. Br. 21-22.) It urges that the decision of the Circuit Court in this case conflicts with decisions of other courts on these questions. The Circuit Court in this case did not make any decision upon either of these questions. Therefore there is no decision thereon by it which can conflict with decisions of

other Circuit Courts. The Circuit Court held, as did the District Court, that the term Raisin Bran, as a matter of fact, had not acquired a secondary meaning.

II. ONE WHO ESTABLISHES SECONDARY MEANING FOR A TERM DOES NOT BECOME ENTITLED TO ITS EXCLUSIVE USE. HE IS ONLY ENTITLED TO PROTECTION AGAINST UNFAIR COMPETITION.

Protection in such cases is limited to requiring competitors to so mark their goods as to show their origin. This Kellogg has done. In such cases "relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension *on the question of origin.*" (*Elgin Nat'l Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 674.) In that case the Court referred to *Reddaway v. Banham*, L. R. (1896) A. C. 199, the famous camel-hair belting case, and other cases on secondary meaning, and held that they "do not sustain the proposition that words which in their primary signification give notice of a general fact, and may be used for that purpose by every one, can lawfully be withdrawn from common use in that sense; but they illustrate the adequacy of the protection from imposition and fraud in respect of a secondary signification afforded by the courts." The Court noted that the injunction granted in *Reddaway v. Banham* enjoined only the use of the words "camel-hair" "in such a manner as to deceive purchasers into the belief that they are purchasing belting of the plaintiffs' manufacture, and from thereby passing off their belting as and for the belting of the plaintiffs' manufacture.' "

The rule applicable is expressed in *Fawcett Publications v. Popular Mechanics Co.*, 80 F. (2d) 194, 197 (C.C.A. 3, 1935): "Equity will not free an injured user

from competition, but only from unfair competition which enables a competitor to deceive the consuming public and sell his products for those of the first user." Many other authorities so hold.⁴ No conflicting decisions upon this question are pointed out in the petition.

Any other rule would give the protection of a technical trademark to a descriptive or generic term for which secondary meaning had been established, although the authorities deny that a descriptive or generic term may be appropriated as a valid trademark (*Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, 461).

Kellogg markets its products as Kellogg's Raisin 40% Bran Flakes, not as Raisin Bran. Kellogg has marketed the cereal portion of the product since 1923, at first under the name of Kellogg's Bran Flakes, and since 1937 under the name of Kellogg's 40% Bran Flakes (R. 894). The word "Raisin" between the words "Kellogg's" and "40% Bran Flakes" indicates merely that raisins are mixed with its 40% Bran Flakes. The word "Kellogg's" on its carton is in the customary bold red script used upon its other cartons. It is its trademark (Ex. 501, R. 903-4). It is known throughout the land to designate a Kellogg product. Kellogg packaged the product in its familiar carton with a white background and printing in red and green (R. 905, 908). Kellogg thus used reasonable care to inform the public of the origin of its product and to prevent confusion and passing off (Finding 55, R. 168). The evidence supporting these conclusions is summarized in subdivisions B and C of the Appendix, pp. 19-22 of this brief.

⁴*Richmond Remedies Co. v. Dr. Miles Medical Co.*, 16 F. (2d) 598, 602 (C.C.A. 8, 1926); *Du Pont Cellophane Co. v. Waxed Products Co.*, 85 F. (2d) 75, 82 (C.C.A. 2, 1936; cert. den. 299 U.S. 601); *DryIce Corporation of America v. Louisiana Dry Ice Corporation*, 54 F. (2d) 882, 885-6 (C.C.A. 5, 1932; cert. den. 286 U.S. 558); *Parsons Bros. & Co. v. John Gillespie & Co.*, 15 R. P. C. 57, 62.

III. PETITIONER SEEKS TO ACHIEVE A VIRTUAL MONOPOLY IN THE MARKETING OF THE PRODUCT. THAT CANNOT BE ACCOMPLISHED UNDER THE GUISE OF PREVENTING UNFAIR COMPETITION.

Kellogg was the pioneer in the successful production of bran ready-to-eat breakfast foods (R. 279). Patents (now expired) were issued to Kellogg in 1915, covering inventions relating to the manufacture of cereal foods made from bran alone or from bran in combination with wheat or other cereals (Ex. 561-564; R. 337-40). Kellogg's All-Bran and the product first marketed under the name of Kellogg's Bran Flakes and later as Kellogg's 40% Bran Flakes (which is the cereal portion of Kellogg's Raisin 40% Bran Flakes) are made according to these patents, with some variations (R. 333-4).

Prior to the first marketing of petitioner's product Kellogg had sold over \$10,000,000 of these bran cereals and had expended nearly \$2,000,000 in advertising them (R. 935), and had suggested in its advertising that fresh, dried and preserved fruits, including raisins, should be eaten with them (Ex. 652, R. 1010-12).

In entering the cereal field in 1925, petitioner presented to the public a cereal product quite similar to the one then being marketed by Kellogg under the name of Kellogg's Bran Flakes. Petitioner mixed whole raisins therewith, thus utilizing the suggestion contained in previous Kellogg advertising that raisins be served with its cereals. In entering the field, petitioner sought by the use of the name Raisin-BRAN to take advantage of the good will for bran products which had been initially created by Kellogg and which had been largely expanded by it and others through advertising. This is shown in a sales manual issued by petitioner to its salesmen (P. Ex. 31-J; R. 1230, Supp. R. 19-20), in which petitioner states:

“One of the biggest assets about RAISIN-BRAN is its NAME, which takes advantage of the millions of dollars spent advertising breakfast cereals and raisins individually, and combines the benefit of this advertising so it attracts both people who like breakfast cereals and those who like raisins.”

Petitioner did not originate the term raisin bran. Prior to its use by petitioner, the terms raisin bran bread⁵ and bran raisin bread⁶ had been used to describe breads made of ingredients which included raisins and bran. Kellogg, as early as 1922, in its advertising recommended the use of its All-Bran to make “bran raisin bread” (Ex. 519, R. 911).

Petitioner’s product initially competed for popularity in the market with other bran and part bran cereal products then being sold. To compete successfully and to take advantage of the good will for that type of cereal product, petitioner used as a name for its product one descriptive of its ingredients. Its complaint now is against competitors who use descriptive words as the names of their products for the same purpose.

It is important to the public that competition should be free. It is only when the product of one producer is likely to be passed off as the product of another that unfair competition exists. The name of the product is an integral part of its good will. Concerning a competitor’s right to the use of the name, it is said in the *Shredded Wheat case* (305 U. S. 121): “To share fully in the good-will, it must use the name.” Taking advantage of the good will of the product is but exercising the right to compete. Only by freedom of competition is monopoly prevented. (305 U. S. 111, 121, 122.)

⁵ Ex. 568, R. 959-60; R. 1251-3; R. 1271.

⁶ Ex. 519, R. 911; R. 1106; Ex. 525-6, R. 914, 968; Ex. 531-2, R. 916, 968.

A monopoly which prevents free and fair competition should not be created under the guise of preventing unfair competition, by restricting one of the competitors in the free use of common words of the language to describe his product or its ingredients,⁷ or in the free use of colors, illustrations or methods of packaging in common use,⁸ where they are used with reasonable precaution to prevent misapprehension with respect to origin of the product.

The importance of the decision in the *Shredded Wheat* case in preventing monopoly and preserving free competition is pointed out in 53 Yale Law Journal, June, 1944, pp. 514-28 *et seq.*

IV. THE CIRCUIT COURT REVIEWED THE FACTS IN THIS CASE IN ACCORDANCE WITH RULE 52(a) OF THE RULES OF CIVIL PROCEDURE AND THE PRACTICE IN EQUITY CASES PRIOR TO THE ADOPTION OF THAT RULE.

The third sentence of Rule 52(a) provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This rule merely states the practice in the Federal Courts in reviewing equity cases prior to its adoption. (Note of Advisory Committee on Rules, 28 U.S.C.A., following §723c,

⁷ *Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111, 116-7; *Saxlehner v. Wagner*, 216 U. S. 375, 380-1; *Elgin Nat'l Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 674, 677.

⁸ *Viavi Co. v. Vimedia Co.*, 245 F. 289, 293 (C.C.A. 8, 1917); *James Heddon's Sons v. Millsite Steel & Wire Works*, 128 F. (2d) 6, 9 (C.C.A. 6, 1942); *Diamond Match Co. v. Saginaw Match Co.*, 142 F. 727, 729-30 (C.C.A. 6, 1906); *Schlitz Brewing Co. v. Houston Ice & Brewing Co.*, 250 U. S. 28, 29, 30; *J. C. Penney Co. v. H. D. Lee Mercantile Co.*, 120 F. (2d) 949, 955, 956 (C.C.A. 8, 1941).

pp. 677-8; *Aetna Life Ins. Co. v. Kepler*, 116 F. (2d) 1, 4-5 (C.C.A. 8, 1941); *District of Columbia v. Pace*, 88 L. Ed. 319, 321.)

The controverted issues of fact here relate (a) to the question as to whether secondary meaning has been established for the term Raisin Bran, and (b) whether Kellogg has used reasonable care to inform the public of the origin of its product and to prevent confusion and passing off.

In its opinion, the Circuit Court stated that the evidence on the first of these questions was conflicting; the issue had been resolved in the trial court in favor of appellees and after referring to a prior decision, concluded: "It seems to us, as it did to the trial court, that the name 'Raisin-BRAN' was not shown to have acquired such a secondary significance as would justify denying to the appellees the right to use the words 'Raisin Bran' in describing their products." (R. Vol. VII, 8, 9.)

Upon the other of these issues of fact, the Circuit Court said: "The records show that the name 'Kellogg's' appears prominently before the name of the product upon the packages containing the raisin bran sold by the Kellogg Sales Company, and that the name 'Post's' appears with equal prominence upon the packages of raisin bran sold by the General Foods Sales Company. The evidence indicates that the names 'Kellogg's' and 'Post's' are commonly known to the trade to represent products made by the Kellogg Company and the General Foods Corporation, respectively. It would seem that any purchaser of raisin bran who was at all interested in its origin should have no difficulty in identifying the raisin bran marketed by either of the appellees and in distinguishing it from the product of the appellant." (R. Vol. VII, 10-11.)

These excerpts from the opinion show that the Circuit Court reviewed the evidence summarized in subdivision

A, Appendix, p. 19 of this brief, on the question of secondary meaning and the evidence summarized in subdivisions B and C, Appendix, pp. 19-22 of this brief, on the subject of Kellogg's use of reasonable care to inform the public of the origin of its product and to prevent confusion and passing off. The evidence so summarized shows that the trial court's findings on these questions are supported by the evidence and that they are not "clearly erroneous". In the Circuit Court, petitioner obtained a review of the facts in accordance with the practice as prescribed by Rule 52 (a) and the equity practice in vogue prior to its adoption.

We submit that the asserted conflict between decisions of Circuit Courts upon the proper interpretation of Rule 52 (a) does not exist.

CONCLUSION.

Respondent does not regard it as necessary in the consideration of the petition for certiorari to present the defense of unclean hands, which was adversely decided to it by both of the courts below. It is respectfully submitted that the petition should be denied.

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